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Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No. 627

ELSIE S. FULLERTON,
Appellant.

vs.

CITY OF SCHENECTADY,
Appellee.

WALTER A. FULLERTON, JR.,
Appellant.

vs.

CITY OF SCHENECTADY,
Appellee.

JURISDICTIONAL STATEMENT & APPENDICES

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IN THE

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No. —

ELSIE S. FULLERTON,
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CITY OF SCHENECTADY,
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WALTER A. FULLERTON, JR.,
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vs.

CITY OF SCHENECTADY,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Jurisdictional Statement.

Appellants appeal from the final judgment rendered by the Court of Appeals of the State of New York entered on December 5, 1955, sustaining the validity of Local Law No. 6 of the City of Schenectady, enacted *April 16, 1935*, as against appellants' contention that said law was repugnant to the Fourteenth Amendment of the Constitution of the United States (record pages 264-266).

Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of these appeals and that substantial Federal questions are presented.

Opinions Below.

Appellate Division, Third Department, Supreme Court, State of New York:

Elsie S. Fullerton v. City of Schenectady and Walter A. Fullerton, Jr., v. City of Schenectady, 285 App. Div. 545.

A copy of the decision and the two opinions is hereto annexed and marked Appendix "A".

Hayward v. City of Schenectady, 251 App. Div. 607.

A copy thereof is hereto annexed and marked Appendix "B".

Court of Appeals, State of New York:

Elsie S. Fullerton v. City of Schenectady and Walter A. Fullerton, Jr., v. City of Schenectady, 309 N. Y. 701.

A copy thereof is hereto annexed and marked Appendix "C".

Memorandum denying reargument and reciting Federal questions.

A copy thereof is hereto annexed and marked Appendix "D".

Jurisdiction.

I. The final judgment of the Court of Appeals was made on July 8, 1955, and judgment entered thereon in the Schenectady County Clerk's office on July 29, 1955 (record pages 248-249).

II. There has been an order denying a reargument, cancelling the judgment for costs against appellants and reciting the federal questions involved entered in the Schenectady County Clerk's office on December 5, 1955 (record pages 261-262).

III. A final amended order and judgment were thereafter entered in the Schenectady County Clerk's office on December 5, 1955. It is from this order and judgment that these appeals are taken to this Court (record pages 267-270).

IV. The jurisdiction of this Court is invoked under 28 U. S. Code Annotated, Section 1257(2), because there was drawn in question the validity of Local Law No. 6 of the City of Schenectady, enacted April 16, 1935, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity (record pages 267-270).

V. Cases which appellants believe sustain this Court's jurisdiction of these appeals are:

King Manufacturing Co. v. City Council of Augusta, 277 U. S. 100, 110-114.

Jamison v. Texas, 318 U. S. 413.

Independent Warehouses v. Scheele, 331 U. S. 70, 79.

Saia v. New York, 334 U. S. 558.

Poulos v. New Hampshire, 345 U. S. 395, 402.

Questions Presented.

The following questions are presented by this appeal:

1. Whether the amended final order and judgment of the Court of Appeals of the State of New York, entered in the Schenectady County Clerk's office December 5, 1955, deprives appellants of their property without due process of law under the Fourteenth Amendment of the Constitution of the United States (Notice of Appeal to this Court, record page 269).

2. Whether Local Law No. 6 of the City of Schenectady, State of New York, was in force on November 13, 1951, the date of the Fullerton accident and whether the rule of stare decisis applies (Notice of Appeal to this Court, record page 269).

3. Whether Local Law No. 6 of the City of Schenectady, State of New York, adopted April 16, 1935, is repugnant to the Constitution of the United States (Notice of Appeal to this Court, record page 270).

4. Whether there has been a denial of the constitutional rights of the appellants (Notice of Appeal to this Court, record page 270).

5. Whether the Court of Appeals of the State of New York erred in affirming the judgment entered March 24, 1955, upon the order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, dismissing the complaint (Notice of Appeal to this Court, record page 270).

Statutes Involved.

Local Law No. 6 of the City of Schenectady, enacted April 16, 1935, is printed in full at pages 212 to 216 of "Record on Appeal", marked A,

The following provisions of law are printed at pages indicated below in this brief:

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Article 1, Section 14, of New York Constitution	40-41
Article IX, Section 12, of New York State Constitution	41
Section 244 of Second Class Cities Law	44
Section 50e of General Municipal Law	42-44
Section 11 of City Home Rule Law	41
Section 36 of City Home Rule Law	42
Civil Practice Act §445, 605	44-45

Statement of the Case.

Appellants, who are husband and wife, sued for personal injuries and damages sustained on November 13, 1951, by reason of a defective sidewalk on the northerly side of State Street (near the New York Central underpass), the principal street in the City of Schenectady (fols. 16-53; 88-128, 233).[1] The complaints allege in detail defendant's negligence (fols. 23-25; 96-99). The service of the written notice of claim in accordance with the provisions of Section 244 of the Second Class Cities Law and 50e of the General Municipal Law is duly alleged (fols. 37-39; 110-112).

Defendant admitted receipt of notice of the claims about December 18, 1951, but denied all the other allegations of the complaints (fols. 55-57; 130, 132).

The cases were tried together before Mr. Justice Gibson and a jury commencing on April 13, 1954 (fols. 154, 155).

This Local Law No. 6 amended Section 244 of the Second Class Cities Law by striking out the provision for constructive notice.

[1] The folio citations are made from the Court of Appeals record in these cases marked "A".

This local law, so far as material, reads:

> "Section 244. No civil action shall be maintained against the City of Schenectady for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed in consequence of the existence of ice or snow thereon, or out of repair, defective, dangerous, unsafe or obstructed in any other way or manner *unless it is made to appear that written notice thereof relating to the particular time and place and condition of such street, highway, bridge, culvert, sidewalk or crosswalk was actually given to the Commissioner of Public Works at least twenty-four hours previous to such damage or injury and that there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of.*" (fols. 634-650)

The cause of appellant's injury was a hole and break in the sidewalk located about 8 feet from the northerly edge of the 19 foot sidewalk (fols. 447, 462). The sidewalk was broken up all the way across (fols. 241, 450, 515). The broken sidewalk extended for a distance of 12 feet (fols. 256, 257, 450). The greatest depth of the depression or hole was 3 inches (fols. 253, 254), the width was 6 inches (fol. 254). The witness Anderson indicated this point on appellant's exhibit 5 with the letter "O" and an arrow (fols. 258, 259).

It had been that way for nine months (fols. 242, 517). It tapered in four ways (fols. 254, 255). Her foot was caught in the hole (fol. 462) and stayed wedged (fol. 464).

It was not such a situation as you would expect on the sidewalk right in the heart of the business section of the main street in the City of Schenectady (fols. 233, 427, 428, 433, 437, 438).

Elsie Fullerton, who had three of her young children with her, the baby being in her left arm (fol. 288), had not noticed the condition of this sidewalk before she fell (fols. 450, 462). Therefore, it would ordinarily be impossible for *her* to comply with the local law and furnish written proof of the condition of the sidewalk at least twenty-four hours previous to the injury.

It is appellants claim that Section 11 of the City Home Rule Law does not give the City of Schenectady power to pass a local law *exempting itself from its own negligence.* This case also involves Section 36 of the City Home Rule Law which, so far as material, reads as follows:

> "Any local law which could be validly enacted under this chapter as hereby amended, if heretofore adopted by the local legislative body of any city and *not heretofore held invalid by a court of competent jurisdiction,* shall be valid and shall not hereafter be held invalid because of any lack of power of such local legislative body to enact such local law at the time of its enactment."

The city did receive prior written notice from another source of the defect causing the Fullerton accident which had existed for nine months prior to the Fullerton accident (fols. 245-249).

After a charge, to which neither party took any exception (fol. 591), the jury rendered verdicts in plaintiffs' favor totaling $12,400 (fol. 592).

On defendant's appeal in the Appellate Division, Third Department, the facts were affirmed (fols. 677, 681, 682, 686) but judgments were reversed on the law and the complaints dismissed (fols. 677, 683, 686). The ground of the reversal was because of the local law which required prior written notice (see folios 685 to 720 of record).

On plaintiffs' appeal to the Court of Appeals, the judgment of the Appellate Division was affirmed by the Court of Appeals without opinion, Burke, J., taking no part.

The Manner In Which the Federal Questions Sought To Be Reviewed Were Raised Was As Follows:

Defendant's motion to dismiss the complaint at the close of plaintiffs' cases was entertained and denied (fols. 533, 534). One of the grounds of the motion was that there was no evidence of any written notice having been given to the city prior to the accident (fol. 534).

At the close of the evidence defendant renewed its motion to dismiss (fol. 552). The Trial Court denied the motion and defendant excepted (fol. 553).

When defendant's counsel offered the local law in evidence, plaintiffs' counsel objected to it as immaterial, and not being relevant and competent here (fol. 551) and in contravention of the Second Class Cities Law (fol. 552).

The Trial Court sustained plaintiffs'-appellants' objection (fol. 552). This local law was not admitted in evidence (fols. 550-552).

Appellants' objection was sufficient to raise the constitutional question in the state court.

Civil Practice Act, §445.

Tooley v. Bacon, 70 N. Y. 34, 37.

Troy Automobile Exchange v. Home Ins. Co., 221 N. Y. 58, 61.

However, the Appellate Division, in Fullerton v. City of Schenectady, 285 App. Div. 545, by a *three to two vote,* held that Local Law No. 6 of the City of Schenectady

was constitutional (fols. 685-720), thus reversing its previous holding on this very question in Hayward v. City of Schenectady, 251 App. Div. 607.

Appellants' appeal to the Court of Appeals (fols. 667-671) brought all questions of law before that Court (Civil Practice Act, §605).

The Questions Are Most Substantial.

This was a very important statewide decision affecting the liability of all cities and villages of the State of New York.

In both the Appellate Division and Court of Appeals, briefs were filed amicus curiae by the New York State Conference of Mayors and Other Municipal Officials. In each instance the order of the Court permitted this to be done.

Appellants contend that these Fullerton cases present special and important reasons why there should be a review by this court.

Here are some of the questions that the Fullerton cases present:

1. *Whether the amended final order and judgment of the Court of Appeals of the State of New York, entered in the Schenectady County Clerk's office December 5, 1955, deprives appellants of their property without due process of law under the Fourteenth Amendment of the Constitution of the United States.*

The Appellate Division has held that the City of Schenectady may by local law free itself from responsibility for its own negligence. The Court of Appeals has affirmed that decision *without opinion.*

Appellants claim that by the decisions of the Supreme Court of the United States a release or other device exempt-

ing defendant from its liability for its own negligence is invalid. Such a release is against public policy. It deprives appellants of their property without due process of law under the Fourteenth Amendment of the Constitution of the United States.

The decision of the Court below in the instant cases are directly in conflict with the decisions of this Court.

Railroad Co. v. Lockwood, 17 Wall (U.S.) 357, 384.
Norfolk Southern Railroad Co. v. Chatman, 244 U. S. 276.
United States v. Atlantic Mut. Ins. Co., 343 U. S. 236, 239.
Bisso v. Inland Waterways Corporation, 349 U. S. 85.
United States v. Nielson, 349 U. S. 129.
Boston Metals Company v. Winding Gulf, 349 U. S. 122.

Appellee has at no time cited a case where such power in a municipality to exempt *itself* from liability has been upheld by the courts.

In the Bisso case, 349 U. S. 85, 95, this Court said:

> "• • • The rule against contractural exemption of a towboat from responsibility for its own negligence cannot be defeated by the simple expedient of providing in a contract that all employees of a towboat shall be employees of the towed vessel when the latter 'employment' is purely a fiction."

Text book writers are to the same effect:

63 Corpus Juris Secundum, page 165, at note 25.
38 American Jurisprudence, at page 382.
American Law Institute on contracts, §575.
N. Y. University Law Review, Vol. 30, No. 8, December, 1955, page 1632.

In the New York University Law Review, Vol. 30, No. 8, December, 1955, at page 1632, it is said:

> "A state statute already permits municipalities to escape a considerable portion of their liability by requiring notice of any claim to be served within a very brief period after an accident. The wisdom of that law is itself highly debatable. If, on top of that, are to be added a host of local laws which grant substantive immunity in sidewalk cases under the guise of procedural regulation, we are indeed starting to turn back the clock to the days when the king could do no wrong."

The clock has been turned back too far. Appellants contend that this local law runs foul of the Fourteenth Amendment to the Federal Constitution.

2. *Whether Local Law No. 6 of the City of Schenectady, State of New York, was in force on November 13, 1951, the date of the Fullerton accident and whether the rule of stare decisis applies.*

Appellants claim that this local law was not in force at the date of the Fullerton accident and that the rule of stare decisis applies.

These appeals involve Federal constitutional questions. Appellants claim that these questions should be determined in accordance with Federal law.

> King Mfg. Co. v. Augusta, 277 U. S. 100, 114.
> Minneapolis etc. Ry. v. Moquin, 283 U. S. 520.

These cases also involve Section 36 of the City Home Rule Law which, so far as material, reads as follows:

> "Any local law which could be validly enacted under this chapter as hereby amended, if heretofore adopted by the local legislative body of any city *and not heretofore held invalid by a court of competent jurisdiction*, shall be valid and shall not hereafter be held

> invalid because of any lack of power of such local legislative body to enact such local law at the time of its enactment."

It is appellants' claim that Schenectady's local law of 1935 was held invalid in the case of Hayward v. City of Schenectady, 251 App. Div. 607, (decided 1937), and that, therefore, this local law had no force or validity on November 13, 1951, the date of Elsie Fullerton's accident (People v. Klinck Packing Co., 214 N. Y. 121, 140).

The Hayward case had been the law in New York State for 18 years.

The practical construction of this statute for 18 years is entitled to great consideration.

> Chicago v. Sheldon, 9 Wall 50, 54.
> Old Colony Trust Co. v. Omaha, 230 U. S. 100, 118.
> Matter of City of New York, 217 N. Y. 1, 12, 13.

The principle of stare decisis applies.

Mr. Justice Coon in his dissenting opinion in the Fullerton case, 285 App. Div. 545, said:

> "Local Law No. 6, the identical enactment here under consideration, has been held invalid and void by this court (Hayward v. City of Schenectady, 251 App. Div. 607). That decision has never been reversed, overruled or superseded. The court below was bound by it and undoubtedly relied upon it. Presumably the City of Schenectady and other cities have disposed of an unknown volume of sidewalk litigation without asserting, until now, the power of a city to impose the requirement of advance written notice. In the interests of certainty, stability and predictability of the law, this court should be bound to adhere to that decision under the principle of stare decisis." (Fols. 707, 708)

This is the precise case for the application of the principle of stare decisis.

Screws v. United States, 325 U. S. 91, 112, 113.
Toolson v. N. Y. Yankees, 346 U. S. 356, 357.

If it is desired to change the law as to constructive notice in municipal cases, it should be done either by (1) State Legislative enactment, or (2) state constitutional amendment, just as was done when the first Workmen's Compensation Act in New York State was held invalid.

Ives v. So. Buffalo Ry. Co., 201 N. Y. 271, 295, 303, 304.

3. *Whether Local Law No. 6 of the City of Schenectady, State of New York, adopted April 16, 1935, is repugnant to the Constitution of the United States.*

The decision of the Court of Appeals is believed to be erroneous and in conflict with Macallen v. Massachusetts, 279 U. S. 620, 629.

Appellants claim that the City of Schenectady is attempting to do indirectly what it cannot do directly.

Appellee's claim is contrary to the applicable decisions of this court.

The majority opinion of the Appellate Division said:

> "I readily agree that local laws of the character involved here are in reality attempts to bar tort actions under the guise of a procedural requirement, and that they put upon many deserving litigants an impossible burden." (fol. 701)

Mr. Justice Coon in his dissenting opinion said:

> "I do not think that anyone will assert, except with tongue in cheek, that the object of the local law here under consideration is other than to reduce the liability of the City for side-

> walk accidents and to fix a standard of liability different from that prevailing in the State as a whole." (fol. 715)

Mr. Justice Coon is absolutely sound in his reasoning. Neither a State legislature nor a common council can do indirectly what they cannot do directly, and so the decisions of *this* court hold.

> Fairbank v. United States, 181 U. S. 283.
> Macallen v. Massachusetts, 279 U. S. 620, 629.

4. *Whether there has been a denial of the constitutional rights of the appellants.*

The decision of the Court below is believed to be erroneous and is in conflict with the following decisions of this Court:

> Railroad Co. v. Husen, 95 U. S. 465, 471.
> Dobbins v. Los Angeles, 195 U. S. 223, 237.
> Coe v. Armour Fertilizer Works, 237 U. S. 413, 424.

In Railroad Co. v. Husen, 95 U. S. 465, 471, this Court said:

> " 'According to the maxim, sic utere tuo ut alienum non loedas, which, being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.' * * *
>
> "But whatever may be the nature and reach of the police power of the State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the national government."

Appellants contend that this local law violates the Fourteenth Amendment of the Federal Constitution and should be struck down by this Court.

In Dobbins v. Los Angeles, 195 U. S. 223, 237, this Court held an ordinance of the City of Los Angeles unconstitutional saying:

> "The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Should not this local law be judged unconstitutional because of what may be done under it?

Appellants claim their rights under the Fourteenth Amendment of the Federal Constitution, and that the decisions of the courts below are in conflict with the applicable decisions of this court.

For example: Appellee could itself dig a hole in the main street of Schenectady 6 feet long, 6 feet wide and 6 feet deep, placing no barrier or warning of any kind around it and still contend under Local Law No. 6 that it was not liable. A plaintiff, stranger to the situation, who had not given prior notice in writing could fall into the hole at night and be seriously injured, and under this drastic local law (fols. 634-650) could not recover.

A law is judged constitutional or otherwise not by what has been done under it, but what *may be done* under it, and so the decisions of this court hold.

Coe v. Armour Fertilizer Works, 237 U. S. 413, 424, 425.
Colon v. Lisk, 153 N. Y. 188, 194.
People ex rel. Alpha P. C. Co. v. Knapp, 230 N. Y. 48, 54; certiorari denied 256 U. S. 702.

In the Colon case, the court said:

> "In discussing the constitutionality of this act, it is to be remembered that the question

> is to be determined not by what has been done under it in any particular instance, but by what may be done under and by virtue of its authority. (Stuart v. Palmer, 74 N. Y. 183; Gilman v. Tucker, 128 N. Y. 190, 200.)"

Stuart v. Palmer, 74 N. Y. 183, is cited with approval in the Coe case, 237 U. S., at pages 424 and 425.

5. *Whether the Court of Appeals of the State of New York erred in affirming the judgment entered March 24, 1955, upon the order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, dismissing the complaint.*

This local law abridges the privileges and immunities of the appellants and other citizens of the United States in violation of the Fourteenth Amendment of the Federal Constitution.

Article 1, Section 14 of the State Constitution reads as follows:

> "Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the *legislature* shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated."

No *municipality* is given power by the City Home Rule Law to amend the common law.

As Mr. Justice McNamee so well pointed out in the Hayward case, 251 App. Div. 607, 611:

> "Despite these limitations, restrictions and inhibitions, the defendant adopted the local law in question, and thereby, in form, rendered not applicable to itself the *common law rule of constructive notice*, and deprived injured members of the public of the benefits of that doctrine, which by statute the Legislature had made binding on all second class cities throughout the state."

Appellee has no sovereign immunity.

In Bernardine v. City of New York, 294 N. Y. 361, 365, the Court said:

> "On the waiver by the State of its own sovereign dispensation, that extension naturally was at an end and thus we were brought all the way round to a point where the civil divisions of the State are answerable equally with individuals and private corporations for wrongs of officers and employees, — even if no separate statute sanctions that enlarged liability in a given instance. (Holmes v. County of Erie, 291 N. Y. 798.)"

The Bernardine case was cited by this Court in a footnote of Indian Towing Company v. United States, 350 U. S. 61, 65, decided November 21, 1955.

By the *common law* of New York State, municipal officers are charged with the performance of corporate duties and the municipality is liable to third persons for injuries occasioned by negligence of such subordinates.

Conrad v. Trustees of the Village of Ithaca, 16 N. Y. 158, 161-163, 165-166 (decided 1857).
Missano v. The Mayor, 160 N. Y. 123, 127, 128.
Barry v. Village of Port Jervis, 64 App. Div. 268, 272, 277.

Williams v. Village of Port Chester, 72 App. Div. 505, 516, 520; 97 App. Div. 84; affd. 183 N. Y. 550.

It may also be noted that the care of streets is proprietary, rather than governmental.

Missano v. The Mayor, 160 N. Y. 123, 127.
Oeters v. City of New York, 270 N. Y. 364, 368.

The decisions of this Court are to the same effect.

Railroad Co. v. Stout, 17 Wall (U. S.) 657, 663-5.
Lincoln v. Power, 151 U. S. 436, 439.
Indian Towing Co. v. United States, 350 U. S. 61, 65, decided November 21, 1955.

Appellants are entitled to due process of law.

Under the subterfuge of the City Home Rule Law, and by the indirect method, re prior written notice, sought here, appellants' rights cannot be taken from them.

Fairbank v. United States, 181 U. S. 283, 294.
Macallen v. Massachusetts, 279 U. S. 620, 629.

We respectfully contend that these cases involve important federal questions of law.

It is submitted that the decision of the Court of Appeals deprives appellants of property without due process of law, in violation of their rights under the Fourteenth Amendment of the Constitution of the United States.

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 105.
Truax v. Corrigan, 257 U. S. 312, 333, 339.
Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673, 682.

In the Cotting case, this Court said:

> "'Every partial or private law, which directly proposes to destroy or affect individual rights or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies

would be governed by one rule, and the mass of the community, who made the law, by another.'

"The Fourteenth Amendment forbids any State to 'deny to any person within its jurisdiction the equal protection of the laws.'"

In the Brinkerhoff-Faris case, this Court said:

"Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Conclusion.

Probable jurisdiction should be noted.

Respectfully submitted,

WALTER A. FULLERTON,
Attorney for Plaintiffs-Appellants
10 City Hall
Saratoga Springs, N. Y.

James A. Leary,
Francis J. Keehan,
Of Counsel.

Appendix A.

SUPREME COURT
APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT
Decision handed down *MAR 16, 1955*

33-21

Elsie S. Fullerton, Respondent,
v.
City of Schenectady, Appellant.

Walter A. Fullerton, Jr., Respondent,
v.
City of Schenectady, Appellant.

Judgments reversed, on the law, and complaints dismissed, without costs.

We affirm the facts.

Opinion by Foster, P. J.

Bergan and Imrie, JJ., concur.

Coon, J., dissents, in an opinion in which Zeller, J., concurs.

SUPREME COURT
APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

[Same Title]

Argued January Term, 1955.
Decided March Term, 1955.

Before:

Hon. Sydney F. Foster,
Presiding Justice
Hon. Francis Bergan,
Hon. William H. Coon,
Hon. Daniel F. Imrie,
Hon. Howard A. Zeller,
Associate Justices.

Appeal from judgments in negligence actions against the City of Schenectady.

Charles Ward Brown, Esq., Corporation Counsel, City of Schenectady, Attorney for Defendant-Appellant, 201 City Hall, Schenectady, N. Y.

Leary, Fullerton & Neddo, Esqs., Attorneys for Plaintiffs-Respondents, 10 City Hall, Saratoga Springs, N. Y.

Opinion for Reversal and Dismissal

FOSTER, P.J.:

Respondents have judgments against the City of Schenectady for personal injuries and derivative damages, arising from a fall of the respondent Elsie S. Fullerton, which was caused by a defective sidewalk. As to the issues of negligence and contributory negligence we would without hesitation affirm the findings of the jury. The difficulty in these cases arises from a local law, adopted by the City of Schenectady on April 16th, 1935, which requires written notice of a defective sidewalk to be given to the Commissioner of Public Works at least 24 hours previous to

the accident as a prerequisite to the maintenance of any action against the City for damages. Concededly no such notice was given by either of the respondents in this case, nor does the complaint allege that a written notice was given by anyone else, and hence if the local law was valid at the time the respondents have no case. The question was properly raised by a motion to dismiss the complaint on that ground during the course of the trial.

This Court, in 1937, held that the very local law in question was invalid (Hayward v. City of Schenectady, 251 App. Div. 607.) As a matter of course the trial court in this case followed that decision and held in effect that constructive notice of the alleged defective condition in the sidewalk was sufficient under Sec. 244 of the Second Class Cities Law.

The rationale of the decision in the Hayward case was briefly: That the Schenectady local law was inconsistent with Section 244 of the Second Class Cities Law; that this statute was of general application to all cities of the Second class, and hence beyond the power of supersession by any local law under the Constitution and statutes as they then existed. As we examine the proposition again it seems to us that the Court in deciding the Hayward case overlooked the basic application of the Second Class Cities Law as defined in the enactment itself. The language of the act is specific:

> "Section 4. Application of this Chapter. A provision of this chapter shall apply, according to its terms, only to a city of the State which on the thirty-first day of December, Nineteen twenty-three, was a city of the second class, *until such provision is superseded pursuant to City Home Rule Law* or otherwise

changed, repealed or superseded pursuant to law." (Emphasis supplied)

Whatever may have been the purpose of continuing the Second Class Cities Law it seems clear from the foregoing language that the Legislature did not intend to put any of its provisions beyond supersession by city home rule. Under such circumstances to say that the Schenectady local law was inconsistent therewith amounts to a contradiction in terms. The only logical argument that could have been used to condemn the local law was to say that it was beyond the constitutional power of the Legislature to delegate to a city of the second class the right to supersede provisions of a statute that applied to it. An examination of the Constitution as it then existed discloses no such prohibition.

Article 12, section 3, of the State Constitution, in effect at the time the local law was enacted, provided in part:

> "Every city shall have power to adopt and amend local laws not inconsistent with the Constitution and laws of the State relating to * * * the transaction of its business, the incurring of its obligations, the presentation, ascertainment and discharge of claims against it, the acquisition, *care, management and use of its streets* and property, * * *." (Emphasis supplied)

That section conferred rather broad powers on the Legislature to enact city home rule legislation. I see nothing in it that attempts to preserve the doctrine of constructive notice in sidewalk cases, or anything that restricts the legislative power to permit the abolition of such a rule by city home rule legislation. It seems rather obvious that the liability of any city, where it may exist

in cases of this character, arises from the "care, management and use of its streets", and the inclusion of these words in the constitutional section quoted carry by clear implication the power to determine by local law what type of notice may be required as a prerequisite to liability in such cases. This power was limited only by the requirement that it should not be exercised inconsistently with the Constitution and Laws of the State. Certainly its exercise with regard to second class cities was not repugnant to the Constitution, and it was not inconsistent with the Second Class Cities Law because, as I have already indicated, that statute specifically permitted the supersession of any of its provisions by local laws. For these reasons I think the Schenectady local law was constitutional at the time the Hayward case was decided and that such decision should no longer be followed.

Passing to the City Home Rule Law, Section 11, subdivision 1, as it existed at the time, (L. 1924 ch 363 as amd. by L. 1928 ch 670) it may be noted that its language followed that of the constitutional provision in almost identical words. Hence there is no persuasive reason to assert that the local law violated any legislative enactment.

In 1938 the constitutional provision dealing with home rule legislation (Art. IX, Sec. 12) was considerably enlarged and the City Home Rule Law was correspondingly expanded (L. 1939 ch 867). In my judgment, however, it is not necessary to rely upon these later amendments or to attempt the avoidance of any conflict with the saving clause of the present City Home Rule Law contained in Section 36 thereof. I am constrained, therefore, to place this decision on the basis that the local law in question was valid under the Constitution and Statutes as they existed at the time it was enacted.

I readily agree that local laws of the character involved here are in reality attempts to bar tort actions under the guise of a procedural requirement, and that they put upon many deserving litigants an impossible burden. However, it is too late in the day to urge this consideration as decisive. This matter was debated and determined long ago, (MacMullen v. City of Middletown, 187 N. Y. 37). We, therefore, deal only with a question of legislative power, and whether the Schenectady law is reasonable or unreasonable is of little moment. Section 8 of the Court of Claims Act, under which the State has waived its sovereign immunity, in no wise alters the situation. That waiver merely applies to areas where before its enactment a defense of sovereign immunity might have been interposed. In any event the decision in Ellis v. City of Geneva (259 App. Div. 502, affd. 288 N. Y. 478) is decisive against any such claim. That case held the local law of a third class city, similar to the one involved here, was constitutional and not subversive of any fundamental law of the State. If the waiver provision of the Court of Claims Act were applicable at all so far as notice is concerned, it would have been applied to all cities irrespective of their class.

The judgments should be reversed and the complaints dismissed.

COON, J., (dissenting):

We are all in accord that these judgments should be affirmed were it not for the failure to allege and prove compliance by the plaintiffs with Local Law No. 6 of 1935 of the City of Schenectady which requires, as a condition precedent to liability for sidewalk injuries, that written notice of the place and nature of the defective sidewalk be given to the Commissioner of Public Works at least twenty-four hours before the injuries are sustained.

not be ignored by a municipality unless it is specifically empowered to do so in terms clear and explicit." *(Jewish Consumptives' Relief Society v. Town of Woodbury,* 230 App. Div. 228, 234, affd., 256 N. Y. 619; see, also, *Matter of Kress & Co. v. Dept. of Health* 283 N. Y. 55).

To be valid a local law must "have a substantial relation to matters within the field where legislative power is vested in the local legislative body of the city by the Constitution and statutes of New York. They must be reasonably calculated to achieve a legitimate public purpose." *(Good Humor Corp. v. City of New York,* 290 N. Y. 312, 317). The same case holds that the object of the local law be an object which the city has the constitutional power to make effective. I do not think that anyone will assert, except with tongue in cheek, that the object of the local law here under consideration is other than to reduce the liability of the City for sidewalk accidents and to fix a standard of liability different from that prevailing in the State as a whole.

It would seem to need little to demonstrate that this local law does in effect offend the fundamental law of liability for torts. It not only abolishes the rule of constructive notice, it removes from consideration actual notice and actual knowledge, no matter how long standing. Though all the officers of the city admitted long-standing actual knowledge of the precise dangerous condition and long-standing opportunity to repair, liability is still dependent upon a written notice to a particular official. Thus the *only* accomplishment of the local law in such a case is to immunize the city from liability. I venture that no one would contend that a city has the power to enact a local law providing that it "should not be liable for the negligence of its officers, agents or employees in relation to its streets."

If that cannot be done directly it cannot be done indirectly under the cover of any guise or subterfuge.

This local law is inconsistent with the public policy of the State and with Section 8 of the Court of Claims Act, which has been held to apply to all cities. *(Bernardine v. City of New York* 294 N. Y. 361). Though the main purpose of Section 8 was to waive soverign immunity, after expressly doing so, it goes further and expressly "consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals and corporations". The Court of Appeals has said "we were brought all the way round to a point where the civil divisions of the State are answerable equally with individuals and private corporations for the wrongs of officers and employees." *(Bernardine v. City of New York,* supra P. 365). If Local Law No. 6 is valid the liability of the City of Schenectady differs substantially from the liability of the State, many civil divisions of the State, and all individuals and private corporations, and sidewalk claims against it may *not* "be determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or private corporations."

MacMullen v. City of Middletown (187 N. Y. 37), does not help us, because it involves the power of the State Legislature, not the power of a city legislative body — an entirely different matter.

I do not regard *Ellis v. City of Geneva* (288 N. Y. 478), as controlling. The local law there involved was not as far-reaching as this one. In that case several grounds were urged for dismissal of the complaint, and it was dismissed. The Court of Appeals affirmed without opinion,

and it may be regarded only as an affirmance of the result in that particular case.

I think the judgments should be affirmed.

Appendix B.

240/51

SUPREME COURT, APPELLATE DIVISION
THIRD DEPARTMENT

DONALD G. HAYWARD AS ADMINISTRATOR, ETC. OF LUELLA McLEAN,
Deceased-Respondent,

—against—

CITY OF SCHENECTADY,
Appellant.

Argued May, 1937, Term.
Decided June, 1937, Term.

Hon. James P. Hill, Presiding Justice.

Hon. Leon C. Rhodes,
Hon. Daniel V. McNamee,
Hon. John C. Crapser,
Hon. F. Walter Bliss, Associate Justices.

Appeal from a judgment of the Supreme Court entered in the office of the clerk of the county of Schenectady, February 1, 1937, on the verdict of a jury, and from an order denying a motion for a new trial.

Leary & Fullerton (Walter A. Fullerton, Francis J. Neddo and Charles W. Aussicker of counsel), attorneys for plaintiff,

Thomas W. Wallace (Arlen T. St. Louis of counsel) attorney for defendant.

McNamee, J.

Belmont Avenue was one of the public streets of the city of Schenectady, running east and west. A sidewalk was located on and along the most southerly portion of the street, and the southerly 5 feet of the walk was paved; and between this pavement and the southerly curb of the driveway was a strip of seeded ground about 3½ feet wide. Close to the curb, in the seeded part, a shut-off water valve was located, which extended about 5 or 6 inches above the surface. About 10:30 o'clock in the evening of May 10, 1935, the deceased was going from the home of a friend, where she had been calling, to reach her car which stood in the street. And while passing over this seeded portion of the sidewalk, she tripped on the protruding valve, fell, and was injured.

It is not questioned here that notice of claim was served on the city, pursuant to and in conformity with the provisions of section 244 of the Second Class Cities Law. The defendant resisted, in the main, on the ground that there was in force in the city of Schenectady at the time of the accident, a local law adopted by the common council pursuant to the Home Rule Amendment of the State Constitution (Article 12), and the City Home Rule Law (Laws of 1924 Chap. 363), which relieved the city of liability when no written notice of the defect had been served prior to the accident. At the close of plaintiff's case and again at the close of the whole case, after timely motion to dismiss on the part of the corporation counsel, the trial court held that the local law, in so far as it applied to this class of cases, was invalid. That ruling presents the chief question on this appeal.

Both the Constitution and the legislative act contain language authorizing the city to adopt local laws in relation to

> "the presentation, ascertainment and discharge of claims against it, the acquisition, care, management and use of its streets and property;"

and it is this provision upon which the appellant relies particularly, as authority for the measure. The question then is whether the city had power to adopt the local law assailed by the respondent.

In so far as important here, section 3 of Article 12 of the State Constitution provides:

> "Every city shall have power to adopt and amend local laws not inconsistent with the constitution and laws of the state, relating to the powers, duties, qualifications, number, mode of selection and removal, terms of office and compensation of all officers and employees of the city, the transaction of its business, the incurring of its obligations, the presentation, ascertainment and discharge of claims against it, the acquisition, care, management and use of its streets and property, * *. The legislature shall * * provide by general law for carrying into effect the provisions of this section."

And section 7 of that Article provides, in so far as of interest in this case:

> "The provisions of this Article shall not affect any existing provision of law; but all existing charters and other laws shall continue in force until repealed, amended, modified or superseded in accordance with the provisions of this Article."

In pursuance of the constitutional authority thus conferred, the legislature passed the City Home Rule Law;

and subdivision 1 of section 11 thereof, as amended, provides, in so far as useful here, as follows:

> "11. Powers of cities to adopt and amend local laws. 1. * * the local legislative body of a city shall have power to adopt and amend local laws in relation to the property, affairs or government of a city including but not limited to the powers, duties, qualifications, number, mode of selection and removal, terms of office and compensation of all officers and employees of the city, the transaction of its business, the incurring of its obligations, the presentation, ascertainment and discharge of claims against it, the acquisition, care, management and use of its streets and property, * * the government and regulation of the conduct of its inhabitants and the protection of their property, safety or health."

Subdivision 2 of section 12 of that statute contains restrictions and provides in part, that

> "No local law shall supersede any provision of an act of the legislature relating to the property, affairs or government of cities which provision in terms and in effect applies alike to all cities, nor any provision of an act of the legislature which provision relates to matters other than the property, affairs or government of cities, whether in terms and in effect applying alike to all cities or not."

Section 244 of the Second Class Cities Law applies to the defendant city, and provides, that no civil action shall be maintained against the city on account of injuries to person or property, due to a defective or unsafe condition of a sidewalk, unless it appear that written notice of such condition

> "was actually given to the commissioner of public works, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair, or remove the

> defect, * * *or, in the absence of such notice, unless it appears that such defective, unsafe, dangerous or obstructed condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence.*"

Upon the authority assumed to have been conferred upon the city by the constitutional provisions and legislative acts mentioned, the defendant city passed the local law in question, in substantially the same language and to the same effect as section 244 above mentioned, with the exception that there was omitted from the local law the provision touching the application of the doctrine of constructive notice, as set forth in Italics in the paragraph herein next above.

It will be observed that the constitutional grant of power to the legislature (Art. 12, sec. 3) is limited to enactments authorizing local laws touching city officers and employees, the transaction of the city business, incurring of city obligations, claims against the city, and the acquisition, care, management, and use of city streets and property. And it is seen also, that the legislative act (Sec. 11, sub. 1) restricted the City's authority to the passage of local laws relative to the "property, affairs or government" of the city, and to the other particulars of authority enumerated in the Constitution almost in *ipsissimis verbis*. No provision is found in the fundamental law, nor was any adopted in the legislative acts, which purports to relieve the city of the duty of proper care of the streets, or of the duty of keeping them reasonably safe for use by the public. Neither is there any such provision relieving the city of the consequences of its own negligence, or enabling it to wipe out its common law and statutory obligation to respond in damages on account of its negligent care of the streets, when constructive

notice has been established. Nor is there any grant of power authorizing the city to limit or determine the rights of the public to recover in such cases for injuries due to its neglect (*Browne* v. *City of New York*, 241 N. Y. 96).

As we have seen, the Constitution continues in force "existing charters and other laws," until superseded "in accordance with the provisions of this article" (Art. 12, sec. 7). The State statute of state-wide application to cities of the second class (Sec. 244), expressly makes applicable to the defendant the doctrine of constructive notice when the necessary facts shall have been proved; and by express enactment, the City Home Rule Law inhibits the supersedence of a local law when the legislature has acted with reference to matters affecting all cities, or with reference to "matters *other* than the property, affairs or government of cities, whether in terms and effect applying alike to all cities or not" (Sec. 12, sub. 2). Despite these limitations, restrictions, and inhibitions, the defendant adopted the local law in question, and thereby, in form, rendered not applicable to itself the common law rule of constructive notice, and deprived injured members of the public of the benefits of that doctrine, which by statute the legislature had made binding on all second class cities throughout the State. Neither the Constitution nor the statute granted such a power; on the contrary, the statute affirmatively withheld the authority to enact such a law. Accordingly, that part of the local law which thus contravenes the Constitution and the statute is void.

We have examined the record touching the character and extent of decedents injuries, and the amount of the verdict. The jury could have found from the evidence that plaintiff's intestate suffered fractures of the elbow joint and of the head of the radius, injuries to the breast and shoulder, be-

sides various cuts and contusions, and that she is left with a substantial limitation in the use of her arm, which interferes with the care of her person. The verdict should not be disturbed.

The judgment and order should be affirmed, with costs.

Appendix C.

Prepared Memoranda by State Reporter from Appeal Papers.

Elsie S. Fullerton, Appellant, v. City of Schenectady, Respondent. 309 N. Y. 701

Walter A. Fullerton, Jr., Appellant, v. City of Schenectady, Respondent.

Argued June 7, 1955; decided July 8, 1955.

Municipal corporations - sidewalks - local law requiring prior written notice of defective sidewalk - in action against city to recover damages for personal injuries sustained by fall on defective sidewalk, Appellate Division stated that local law of City of Schenectady which required prior written notice of defective sidewalk as condition precedent to action against city for damages was valid, and, since plaintiffs did not comply therewith, directed dismissal of complaint - in Court of Appeals plaintiffs argued that local law was invalid and unconstitutional - judgment affirmed. FULLERTON V. CITY OF SCHENECTADY, 285 App. Div. 545, affirmed.

Appeal from a judgment in favor of defendant, entered March 24, 1955, upon an order of the Appellate Division of the Supreme Court in the third judicial department,

which (1) reversed, on the law, a judgment of the Supreme Court in favor of the plaintiff, entered in Schenectady County upon a verdict rendered at a Trial Term (Gibson J.), in each of the above-entitled actions, and (2) dismissed the complaints. Plaintiff wife sought to recover damages for personal injuries sustained on November 13, 1951, as a result of falling on a defective sidewalk in front of the premises 313-315 State Street in the city of Schenectady, and her husband sought to recover damages for medical expenses and loss of services. The complaints alleged the service of a written notice of claim on the city in accordance with section 244 of the Second Class Cities Law and section 50-e of the General Municipal Law. Section 11 of article IX of the State Constitution provides that: "The legislature shall act in relation to the property, affairs or government of any city only by general laws which shall in terms and in effect apply alike to all cities * * *. The legislature may by general laws confer on cities such powers of local legislation and administration in addition to the powers vested in cities by this article as it may, from time to time, deem expedient and may withdraw such powers." Section 12 of article IX of the Constitution provides that: "Every city shall have power to adopt and amend local laws not inconsistent with the constitution and laws of the state relating to its property, affairs or government. Every city shall also have the power to adopt and amend local laws not inconsistent with this constitution and laws of the state, and whether or not such local laws relate to its property, affairs or government, in respect to the following subjects: * * * the transaction of its business, the incurring of its obligations, the presentation, ascertainment and discharge of claims against it, the acquisition, care, management and use of its streets and property". Section 11 of the City Home Rule Law

empowers cities to adopt local laws in relation to "the transaction of its business, the presentation, ascertainment and discharge of claims against it, the acquisition, care, management and use of its streets and property * * *. Such local laws may change or supersede any provision of an act of the legislature theretofore enacted which provision does not in terms and in effect apply alike to all cities." Section 4 of the Second Class Cities Law provides that: "A provision of this chapter shall apply, according to its term, only to a city of the state which on the thirty-first day of December, nineteen hundred and twenty-three was a city of the second class, until such provision is superseded pursuant to the city home rule law or otherwise changed, repealed or superseded pursuant to law." Section 244 of the Second Class Cities Law provides that no action shall be maintained against a city for damages sustained by reason of a defective sidewalk unless written notice of the defect was given to the commissioner of public works and there was a failure to repair thereafter or "in the absence of such notice, unless it appears that such defective * * * condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence." Local Law No. 6 of 1935 of the City of Schenectady amended section 244 of the Second Class Cities Law, in its application to the City of Schenectady, so as to eliminate the provision permitting an action for personal injuries sustained as a result of a defective sidewalk based on constructive notice, and provided instead that the action could not be maintained unless written notice of the alleged defective condition was given to defendant city at least twenty-four hours prior to the happening of the accident. The Appellate Division stated: "Concededly no such notice was given by either of the respondents in

this case, nor does the complaint allege that a written notice was given by anyone else, and hence if the local law was valid at the time the respondents have no case. * * * the local law in question was valid under the Constitution and statutes as they existed at the time it was enacted." In the Court of Appeals plaintiffs argued that said local law was invalid; that the local law violates the State and Federal Constitutions and the common law; that the attempt of the municipality to relieve itself of liability for the acts of its employees was against public policy; that defendant cannot by local law change the common law of constructive notice; that defendant could not modify the Second Class Cities Law by a local law, and that the local law did not come within the scope of amendments permitted by the City Home Rule Law.

James A. Leary, Walter A. Fullerton, Charles W. Aussicker, William L. Ford and Francis J. Keehan for appellants.

Charles Ward Brown for respondent.

Donald A. Walsh and Harold W. Weidner for New York State Conference of Mayors and Other Municipal Officials, amici curiae, in support of respondent's position.

Judgment affirmed, with costs; no opinion.

Concur: Conway, Ch. J., Desmond, Dye, Fuld, Froessel and Van Voorhis, JJ. Taking no part: Burke, J.

Appendix D.

Amended Decision

"418. E. Fullerton, ap. v. City of Schenectady, res; W. Fullerton, ap, v. City of Schenectady, res - Motion for reargument denied. Motion to amend the remittitur granted. Return of the remittitur requested and, when returned, it will be amended to read as fol-

lows: 'Judgment affirmed, without costs. Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Whether plaintiffs have been deprived of property without due process of law under the Fourteenth Amendment of the Constitution of the United States; and whether Local Law No. 6 of the City of Schenectady, effective April 16, 1935, is repugnant to the Constitution of the United States. The Court of Appeals held that there was no denial of any constitutional right of the plaintiffs." New York Law Journal Nov. 21, 1955, page 8.

Appendix E.

Fourteenth Amendment

The Fourteenth Amendment to the Federal Constitution, so far as material, reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 14, of the New York State Constitution reads as follows:

> "Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April,

> one thousand seven hundred seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated."

Article IX, Section 12, of the New York State Constitution, so far as material, reads as follows:

> "Every city shall have power to adopt and amend local laws not inconsistent with the constitution and laws of the state relating to its property, affairs or government. Every city shall also have the power to adopt and amend local laws not inconsistent with this constitution and laws of the state, * * *."

Section 11 of the City Home Rule Law, so far as material, reads as follows:

> "Subject to the restrictions provided in this chapter, the local legislative body of a city shall have power to adopt and amend (a) local laws in relation to the property, affairs or government of the city and (b) local laws in relation to the qualifications, number, mode of selection and removal, terms of office and compensation of all its officers and employees (not including officers who perform no functions for the city except as members of the governing elective body of a county in which such city is wholly contained), the membership and constitution of its local legislative body, the transaction of its business, the presentation, ascertainment and discharge of claims against it, the acquisition, care, management and use of its streets and property, * * *. Such local

laws may change or supersede any provision of an act of the legislature theretofore enacted which provision does not in terms and in effect apply alike to all cities."

Section 36 of the City Home Rule Law, so far as material, reads as follows:

"Any local law which could be validly enacted under this chapter as hereby amended, if heretofore adopted by the local legislative body of any city and *not heretofore held invalid by a court of competent jurisdiction,* shall be valid and shall not hereafter be held invalid because of any lack of power of such local legislative body to enact such local law at the time of its enactment."

Section 50-e of the General Municipal Law, so far as material, reads:

"1. In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general corporation law, or any officer, appointee or employee thereof, the notice shall comply with the provisions of this section and it shall be given within ninety days after the claim arises.

"2. The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable.

"3. The notice shall be served on the party against whom the claim is made by delivering the notice, or a copy thereof, personally, or by

registered mail, to the person, officer, agent, clerk or employee, designated by law as a person to whom a summons in an action in the supreme court issued against such party may be delivered; provided that if service of such notice be made within the period prescribed by this section, but in a manner not in compliance with the provisions of this subdivision, such service shall be deemed valid if such notice is actually received by such person, officer, agent, clerk or employee and such party against whom the claim is made shall cause the claimant or any other person interested in the claim to be examined in regard to such claim.

"4. No other or further notice, no other or further service, filing or delivery of the notice of claim, and no notice of intention to commence an action or special proceeding, shall be required as a condition to the commencement of an action or special proceeding for the enforcement of the claim; provided, however, that nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition. and the failure or negligence to repair or remove the same after the receipt of such notice.

* * *

"6. At or before the trial of an action or the hearing upon a special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as

the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby. Application for such relief if made before trial, shall be by motion, on affidavits."

Section 244 of the Second Class Cities Law of New York State which, so far as material, reads as follows:

"No civil action shall be maintained against the city for da ages or injuries to person or property susta ed in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed unless it appear that written notice of the defective, unsafe, dangerous, obstructed condition of such street, highway, bridge, culvert, sidewalk or crosswalk was actually given to the commissioner of public works, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair, or remove the defect, danger or obstruction complained of, or, in the absence of such notice, *unless it appears that such defective, unsafe, dangerous or obstructed condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence.*"

Civil Practice Act, §445, so far as material, reads:

"Subject to the provisions of section four hundred forty-six of this act, an exception shall be deemed to have been taken by the party adversely affected to every ruling either before or after the cause is finally submitted, where such party, at the time when such ruling is sought or made, makes known to the court, judge or referee his position thereon by objection or otherwise."

Civil Practice Act, §605, reads as follows:

> "The court of appeals shall be limited to review of questions of law, except that it shall review the questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, has expressly or impliedly found new facts, and a final judgment or a final order pursuant thereto has been entered."

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Supreme Court of the United States

October Term, A. D. 1955.

No. 627.

ELSIE S. FULLERTON,

Appellant,

vs.

CITY OF SCHENECTADY,

Appellee.

WALTER A. FULLERTON, JR.,

Appellant,

vs.

CITY OF SCHENECTADY,

Appellee.

Motion to Dismiss and Brief in Support Thereof.

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THE REPORTER COMPANY, INC., Walton, N. Y.—1956

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Supreme Court of the United States

October Term, A. D. 1955.

No. 627

ELSIE S. FULLERTON, Appellant, vs. CITY OF SCHENECTADY, Appellee.	
WALTER A. FULLERTON, Jr., Appellant, vs. CITY OF SCHENECTADY, Appellee.	

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

Now comes the appellee in the above entitled cause, by its counsel of record, and moves that the appeal herein be dismissed.

Statement of the Case.

This appeal is from a final judgment of the Court of Appeals of the State of New York, which final judgment was duly entered in the Schenectady County Clerk's Office, State of New York, on December 5th, 1955. Said judgment sustained the validity and constitutionality of Local Law No. 6 of the City of Schenectady, effective April 16th, 1935.

The actions were originally brought in the Supreme Court, Schenectady County, State of New York, to recover damages for personal injuries sustained by appellant Elsie S. Fullerton, when she fell on a sidewalk on State Street in the City of Schenectady, New York on November 13th, 1951, and her husband, appellant Walter A. Fullerton, Jr., sued to recover for the damages he sustained as a result of the injuries to his wife.

The actions were based on negligence and the appellee raised the defenses that it was not negligent; that the appellant Elsie S. Fullerton was guilty of contributory negligence and that she had not given prior written notice of any alleged defect in the sidewalk to appellee, as required by Local Law No. 6 of the City of Schenectady.

The actions were tried together before Mr. Justice Gibson and a jury commencing on April 13th, 1954, and the jury rendered verdicts in appellants' favor in the total amount of $12,500.

During the course of the trial, appellee offered in evidence a certified copy of Local Law No. 6 which was duly objected to by counsel for the appellants, which objection was sustained by the Presiding Judge, which ruling was duly excepted to by appellee (fols. 550-552).

At the close of appellants' cases, appellee duly moved to dismiss the complaints on the ground that there was no evidence in the entire record of any written notice having been given to the City prior to the accident, as required by Local Law No. 6, which motion was denied by the Presiding Judge and duly excepted to by appellee (fols. 533-534).

At the close of the evidence, appellee renewed its motion to dismiss for failure to give prior written notice, which motion was denied and duly excepted to by appellee (fols. 552-553).

Appellee moved to set aside the verdicts of the jury on the ground that they were contrary to the law, which motion was denied and duly excepted to by appellee (fols. 592-593).

Appellant Elsie S. Fullerton did not, at any time prior to the accident, give any written or oral notice to the City of the alleged defective condition of the sidewalk (fol. 465).

Appellant Elsie S. Fullerton fell at about 4:10 P. M. and it was a nice clear day, the sun was shining, there was no rain or snow and the pavement was dry (fols. 21, 424, 433-434).

Appellee appealed to the Appellate Division of the Supreme Court, Third Department, and the judgments were reversed, on the law, and the complaints dismissed (fols. 676, 683, 686). The ground of the reversal and the dismissal of the complaints was based upon the conclusion of the Appellate Division that the local law, requiring prior written notice, was valid and constitutional and appellant's failure to give the City such prior written notice, was fatal to her cause of action (*Fullerton vs. City of Schenectady*, 285 App. Div. 545; fols. 685-703).

The appellants appealed to the Court of Appeals from the judgment of the Appellate Division and the Court of Appeals unanimously affirmed, without opinion, Burke, J., taking no part, the judgment of the Appellate Division (*Fullerton vs. City of Schenectady*, 309 N. Y. 701). The appellants moved the Court of Appeals for permission to re-argue the matter or, in the alternative, for an amendment to the remittitur for the purpose of showing that constitutional questions had been considered and passed upon by the Court of Appeals.

The Court of Appeals denied appellants' motion for re-argument, but granted their motion to amend the remittitur. The amended decision of the Court of Appeals, dated November 17th, 1955, was as follows:

> "Motion for re-argument denied.
>
> Motion to amend remittitur granted. Return of the remittitur requested and, when returned, it will be amended to read as follows: Judgment affirmed, without costs. Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Whether plaintiffs have been deprived of property without due process of law under the Fourteenth Amendment of the Constitution of the United States; and whether Local Law No. 6 of the City of Schenectady, effective April 16, 1935, is repugnant to the Constitution of the United States. The Court of Appeals held that there was no denial of any constitutional right of the plaintiffs. (See 309 N. Y. 701.)"

Fullerton vs. City of Schenectady, 309 N. Y. 855.

The appellants have appealed to this Court, pursuant to Title 28, United States Code, Section 1257(2). The Notice of Appeal to this Court, dated December 12th, 1955, and filed in the Office of the Schenectady County Clerk, State of New York, contends that Local Law No. 6 of the City of Schenectady, State of New York, effective April 16th, 1935, is repugnant to the Constitution of the United States and that there has been a denial of the constitutional rights of the appellants.

ARGUMENT.

It is obvious that the questions sought to be reviewed do not present a substantial federal question and that the judgment of the Court below rests on an adequate non-federal basis.

The only question involved is the validity and constitutionality of Local Law No. 6 of the City of Schenectady, duly adopted pursuant to the provisions of the New York State Constitution, the City Home Rule Law and the Second Class Cities Law of the State of New York.

It is conceded that the City of Schenectady is a second class city. It is not disputed that Local Law No. 6 is in proper form and was presented and lawfully adopted in the manner and form prescribed by the City Home Rule Law; nor is it disputed that on November 13th, 1951, the date of this accident, this local law was in force and effect (fols. 550-552).

Article IX, Section 12, of the New York State Constitution, so far as material, reads as follows:

> (Power of cities to enact local laws relating to property, affairs or government.)
>
> "Every city shall have power to adopt and amend local laws not inconsistent with the constitution and laws of the state relating to its property, affairs or government. Every city shall also have the power to adopt and amend local laws not inconsistent with this constitution and laws of the state, *and whether or not such local laws relate to its property, affairs or government, in respect to the following subjects*: * * *, the transaction of its business, the incurring of its obligations, *the presentation, ascertainment and discharge of claims against it, the acquisition, care, management and use of its streets and property*, * * *.

The provisions of this article shall not be deemed to restrict or diminish the existing powers of any city."

Article IX, Section 13, of the New York State Constitution, so far as material, reads as follows:

(Existing laws to remain applicable; reservation of power in legislature over certain matters.)

"A. The provisions of this article shall not affect any existing provisions of law not inconsistent with this article; but all existing charters and other laws, so far as not inconsistent with this article, shall continue in force until repealed, amended, modified or superseded in accordance with the provisions of this article.

B. * * *."

Section 11 of the City Home Rule Law, so far as material, reads as follows:

(Power of cities to adopt and amend local laws.)

"Subd. 1. Subject to the restrictions provided in this chapter, the local legislative body of a city shall have power to adopt and amend (a) local laws in relation to the property, affairs or government of the city and (b) * * *, the transaction of its business, *the presentation, ascertainment and discharge of claims against it, the acquisition, care, management and use of its streets and property, * * *, whether such local laws relate to the property, affairs or government of such city or not. Such local laws may change or supersede any provision of an act of the legislature theretofore enacted which provision does not in terms and in effect apply alike to all cities.* * * *."

Section 244 of the Second Class Cities Law, so far as material, reads as follows:

"No civil action shall be maintained against the city for damages or injuries to person or property

sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed unless it appears that written notice of the defective, unsafe, dangerous, obstructed condition of such street, highway, bridge, culvert, sidewalk or crosswalk was actually given to the commissioner of public works, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair, or remove the defect, danger or obstruction complained of, or, in the absence of such notice, unless it appears that such defective, unsafe, dangerous or obstructed condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence. But no such action shall be maintained for damages or injuries to the person sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk or street, unless written notice thereof, relating to the particular place, was actually given to the commissioner of public works and there was a failure or neglect to cause such snow or ice to be removed, or the place otherwise made reasonably safe within a reasonable time after the receipt of such notice. * * *."

Section 2 of the Second Class Cities Law reads as follows:

Term city defined.

"The term 'city,' when used in this chapter, means a city of the second class."

Section 4 of the Second Class Cities Law reads as follows:

Application of chapter.

"A provision of this chapter shall apply, according to its term, only to a city of the state which on the thirty-first day of December, nineteen hundred

> and twenty-three, was a city of the second class, *until such provision is superseded pursuant to the city home rule law or otherwise changed, repealed or superseded pursuant to law.*"

Local Law No. 6 of the City of Schenectady, printed in full at pages 212-216 of "Record on Appeal," merely eliminated the provisions pertaining to constructive notice in Section 244 of the Second Class Cities Law and provided that no civil action could be maintained against the City of Schenectady for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe or dangerous unless it was made to appear that written notice of the defective condition was actually given to the Commissioner of Public Works at least twenty-four (24) hours previous to such damage or injury, and that there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of.

Appellee contends that the written notice, required by Local Law No. 6, was merely a condition precedent to the maintenance of an action against the City and did not create anything new, for Section 244 of the Second Class Cities Law, in itself, provided that prior written notice was required where injuries were sustained as the result of snow or ice upon any sidewalk, crosswalk or street.

Conditions precedent to the maintenance of an action are not new and are contained in many statutes, including but not limited to Section 50-e of the General Municipal Law of the State of New York which, in part, states that:

> "In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, shall be given

within ninety days after the claim arises and must conform to the provisions set forth in said section."

The validity and constitutionality of requiring prior written notice as a condition precedent to the maintenance of an action against a city in the State of New York has long ago been decided and has been consistently followed and if said requirement, requiring prior written notice, be regarded as harsh and imposing too great a burden on litigants, the correction and remedy is not to be sought from the Courts but from the Legislature.

MacMullen vs. City of Middletown, 187 N. Y. 37 at page 47 (1907).

In the *MacMullen* case, *supra*, the Court further said at page 41:

> "The power to grant, or to deny, a remedy by private action for the breach of a duty, imposed upon it for governmental purposes, and to affix conditions, where the right to an action is given, is not one which should be called in question. * * *. The cases are numerous, which involved the right of a municipality to defeat the claims of a plaintiff, because of the failure to show notice, or knowledge, on its part of the conditions complained of and because of the failure to comply with statutory requirements of notice to municipal officers, before the commencement of an action."

A local law amending a city charter, requiring notice in writing prior to the accident in question, was held to be valid and constitutional and was a condition precedent which the plaintiff was required to plead and prove in order to maintain the action.

Ellis vs. City of Geneva, 259 App. Div. 502, affd. 288 N. Y. 478 (1942).

State laws, local laws and charter provisions, requiring prior written notice as a condition precedent to the

maintenance of an action against a municipality, have been held valid and constitutional, and that said requirement does not limit the duty of the city to maintain its streets in a reasonably safe condition for use by the public, nor relieve the city of the consequences of its own negligence.

MacMullen vs. City of Middletown, supra;
Ellis vs. City of Geneva, supra;
Pasquale vs. City of Saratoga Springs, 250 App. Div. 808;
Curry vs. City of Buffalo, 135 N. Y. 366;
Golden vs. City of Rome, 277 App. Div. 832;
Ross vs. City of Long Beach, N. Y. L. J., July 29, 1954;
Snyder vs. Delmin Realty Corp., N. Y. L. J., November 18, 1954.

The appellants, in the second paragraph on page 13 of their Jurisdictional Statement, admit that the law as to constructive notice in municipal cases may be changed by state legislative enactment. By this statement, appellants frankly admit that a state statute, requiring prior written notice, would not be repugnant to the Constitution of the United States and would not deprive a person of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. If the state can lawfully enact a statute requiring prior written notice, a municipality may do likewise with the same force and effect, pursuant to the Home Rule Provisions of the New York State Constitution and the City Home Rule Law, for, by these provisions, the state delegated to the cities the power to enact such legislation.

The Court, in *MacMullen vs. City of Middletown, supra,* said at page 41:

> "A municipal corporation is a political, or governmental, agency of the state, which has been constituted for the local government of the territorial division described and which exercises, by delegation, a portion of the sovereign power for the public good."

The heavy weight of the authorities cited herein, in their direct application to the facts and contentions here present, seem to us to conclusively establish that the issues raised do not present a substantial federal question and that the judgment of the Court below rests on an adequate non-federal basis, not warranting further review.

We respectfully submit that the appeal herein should be dismissed.

Dated: February 6th, 1956.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1955

No. 627

ELSIE S. FULLERTON,
Appellant,

vs.

CITY OF SCHENECTADY,
Appellee.

WALTER A. FULLERTON, JR.,
Appellant,

vs.

CITY OF SCHENECTADY,
Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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IN THE

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No. 627

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Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

We shall briefly call attention to certain errors appearing in appellee's brief:

a) At page 5, appellee states, "nor is it disputed that on November 13, 1951, the date of this accident, this local law was in force and effect."

That fact is disputed.

We argued this point at pages 11 to 12 of our Jurisdictional Statement and at page 12 of that brief stated:

> "It is appellants' claim that Schenectady's local law of 1935 was held invalid in the case of Hay-

ward v. City of Schenectady, 251 App. Div. 607, (decided 1937), and that, therefore, this local law had no force or validity on November 13, 1951, the date of Elsie Fullerton's accident (People v. Klinck Packing Co., 214 N. Y. 121, 140)."

b) At page 5, appellee quotes Article IX, Section 12 of the New York State Constitution which, so far as material, reads:

> "Every city shall also have the power to adopt and amend local laws not inconsistent with this constitution and laws of the state, * * *."

Our claim is that Local Law No. 6 of the City of Schenectady is inconsistent with the Fourteenth Amendment to the Constitution of the United States.

That claim is made particularly under headings 1, 3, 4 and 5 of our Jurisdictional Statement (pages 9-11, 13-19).

c) The case of MacMullen v. City of Middletown, 187 N. Y. 37 (Appellee's brief, page 9) is clearly distinguishable.

Judge Coon pointed out that distinction in his dissenting opinion in the Fullerton case, 285 App. Div. 545, 551. He said:

> "MacMullen v. City of Middletown (187 N. Y. 37), does not help us, because it involves the power of the State Legislature, not the power of a city legislative body—an entirely different matter." (Appellants' Jurisdictional Statement, page 29.)

d) The case of Ellis v. City of Geneva, 259 App. Div. 502, affd. 288 N. Y. 478 (Appellee's brief, page 9) is clearly distinguishable.

Again, Judge Coon in his dissenting opinion in the Fullerton case, 285 App. Div. 545, 551, distinguished the Ellis case. He said:

> "I do not regard Ellis v. City of Geneva (288 N. Y. 478), as controlling. The local law there involved was not as far-reaching as this one. In that case several grounds were urged for dismissal of the complaint, and it was dismissed. The Court of Appeals affirmed without opinion, and it may be regarded only as an affirmance of the result in that particular case."
> (Appellants' Jurisdictional Statement, pages 29, 30.)

The affirmance by the Court of Appeals, without opinion, simply means that that Court approved of the *result*. It does not mean that it approved of the reasoning of the Court below.

> Rogers v. Decker, 131 N. Y. 490, 493.
> Viertels v. New York, Ontario & Western R. Co., 182 App. Div. 92, 94.

A case is authority only for what is actually decided.

> O'Donoghue v. United States, 289 U. S. 516, 550.

e) At page 8, our opponent states:

"Appellee contends that the written notice, required by Local Law No. 6, was merely a condition precedent to the maintenance of an action against the City and *did not create anything new,* * * *."

And at page 10, appellee states:

> " * * * said requirement does not limit the duty of the city to maintain its streets in a reasonably

safe condition for use by the public, nor relieve the city of the consequences of its own negligence."

The conclusive answer to this contention is Judge Coon's dissenting opinion in the Fullerton case, 285 App. Div. 545, 550, 551. We quote:

"It would seem to need little to demonstrate that this local law does in effect offend the fundamental law of liability for torts. It not only abolishes the rule of constructive notice, it removes from consideration actual notice and actual knowledge, no matter how long standing. Though all the officers of the city admitted long-standing actual knowledge of the precise dangerous condition and long-standing opportunity to repair, liability is still dependent upon a written notice to a particular official. Thus the *only* accomplishment of the local law in such a case is to immunize the city from liability. I venture that no one would contend that a city has the power to enact a local law providing that it 'should not be liable for the negligence of its officers, agents or employees in relation to its streets.' If that cannot be done directly it cannot be done indirectly under the cover of any guise or subterfuge."

(Appellants' Jurisdictional Statement, pages 28 and 29.)

Even the majority opinion in the Appellate Division, 285 App. Div. 545, 548, makes this startling admission:

"I readily agree that local laws of the character involved here are in reality attempts to bar tort actions under the guise of a procedural require-

ment, and that they put upon many deserving litigants an impossible burden."
(Appellants' Jurisdictional Statement, page 25.)

f) At page 10, appellee states:

"If the state can lawfully enact a statute requiring prior written notice, a municipality may do likewise with the same force and effect, * * *."

Appellants claim appellee is in error for two reasons:

First. A State statute and a municipal ordinance do not stand on the same footing.

That appellee is in error is made clear by Judge Coon's dissenting opinion in the Fullerton case, 285 App. Div. 545, 550, when he said:

"Given their ordinary and accepted meaning, I cannot construe the words 'acquisition, care, management and use' [contained in Section 3, Article XII of New York Constitution, in effect at the time] as conveying any power beyond the necessary legislation to acquire and own the streets and regulate the use of them by the public and to prevent their misuse. 'The authority of a municipality to abrogate State law is never implied or inferred. It is only derived from express grant, never from a general grant of power. A State policy may not be ignored by a municipality unless it is specifically empowered to do so in terms clear and explicit.' (Jewish Consumptives' Relief Society v. Town of Woodbury, 230 App. Div. 228, 234, affd., 256 N. Y. 619; see, also, Matter of Kress & Co. v. Dept. of Health, 283, N. Y. 55)." (Appellants' Jurisdictional Statement, pages 27 and 28.)

This Court in Saia v. New York, 334 U. S. 558, was construing a city ordinance which was not narrowly drawn (page 560). This Court held Saia's rights were "protected by the Fourteenth Amendment against State action." (page 560)

This Court further said at page 562:

> "Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here."

Second. A state can, within reasonable limitations, exonerate a municipality from liability.

It is against public policy for a municipality to release *itself* from liability.

We argued this point at pages 9 to 11 of our Jurisdictional Brief and do not repeat same here.

g) At page 11, appellee states that "the issues raised do not present a substantial federal question."

The Court of Appeals, however, stated in their amended decision:

> "Judgment affirmed, without costs. Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Whether plaintiffs have been deprived of property without due process of law under the Fourteenth Amendment of the Constitution of the United States; and whether Local Law No. 6 of the City of Schenectady, effective April 16, 1935, is repugnant to the Constitution of the United States. The Court of Appeals held that there was no denial of any constitutional right of the plaintiffs." New York Law Journal November 21, 1955, page 8.
>
> (Appellants' Jurisdictional Statement, page 40.)

This amended decision in the Fullerton cases is now officially reported in 309 N. Y. 855.

It seems to us that the language of the late Justice Rutledge (later of this Court) in President & Directors of Georgetown College v. Hughes, 130 F. 2d 810, 812, is precisely in point, when he said:

> "The cases are almost riotous with dissent. Reasons are even more varied than results. These are earmarks of law in flux. They indicate something wrong at the beginning or *that something has become wrong since then.* They also show that correction, though in process, is incomplete."

We respectfully submit that these cases present federal questions which should be reviewed by this Court.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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No. 627. FULLERTON ET VIR. *v.* CITY OF SCHENECTADY. Appeal from the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Walter A. Fullerton* for appellants. *Charles W. Brown* for appellee. Reported below: 309 N. Y. 701, 855, 128 N. E. 2d 413, 130 N. E. 2d 909.